BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

C.R. ENGLAND, INC.

Employer

And Case 13-RC-095967

TEAMSTERS, LOCAL 705,

Petitioner

RESPONSE OF EMPLOYER TO HEARING OFFICER'S REPORT ON OBJECTIONS AND SUPPLEMENT TO EMPLOYER'S EXCEPTIONS TO PURPORTED REGIONAL DIRECTOR PETER ORR'S REPORT ON OBJECTIONS

Introduction

The Hearing Officer's Report on Objections in this R Case was issued on May 16, 2013. Pursuant to Section 102.69 of the Board's Rules and Regulations, Employer C.R. England is obliged to file any exceptions to the Hearing Officer's Report by May 30, 2013. In the interest of preserving resources in this proceeding, Employer declines to file exceptions to the Hearing Officer's Report.

Employer takes opportunity, however, to note once again its timely filing on March 27, 2013 of "Exceptions of Employer to Purported Regional Director Peter Orr's Report on Objections [issued by Mr. Orr on March 15, 2013]" and to provide this supplemental filing on the issue of the authority and validity of election raised in Employer's Memorandum of Law dated February 26, 2013. On March 15, the Regional Director sparsely and inadequately addressed Employer's controlling substantive argument flowing from the D.C. Circuit's decision in *Noel Canning v. NLRB.* Employer

now takes this opportunity to apprise the Board of the continued controlling significance of its position in view of the new decision of the U.S. Court of Appeals for the 3RD Circuit in *National Labor Relations Board v. New Vista Nursing and Rehabilitation,* Nos. 12-1027 and 12-1936 (May 16, 2013).

Supplemental Argument

In its scholarly 102-page decision in *New Vista Nursing and Rehabilitation*, the Third Circuit squarely addressed the validity of the recess appointment of purported NLRB Member Craig Becker, who along with a purported Board comprised of Member Mark Pearce, Member Brian Hayes, and purported Member Becker invalidly appointed Peter Orr as Region 13 Director on December 13, 2011. The Court held that purported Member Becker "was invalidly recess appointed to the Board during the March 2010 intrasession break" of the U.S. Senate. Therefore, the Court further held that a delegee group of the Board including purported Member Becker "acted without power and lacked jurisdicition when it issued an order on August 26, 2011. *Id. at 101*-102.

The Third Circuit agreed with the D.C. Circuit's *Noel Canning* holding that the term "recess" refers only to "intersession breaks" between formal sessions of the Senate and not breaks within a session ("intrasession breaks") during which the Senate is unable to provide advice and consent. The Court narrowly interpreted the Recess Appointments Clause of the U.S. Constitution based on historical practice dating back to the ratification of the Constitution and the importance of balancing the President's unilateral appointment power with the Senate's advice and consent function. The Court evaluated the purpose of the Recess Appointments Clause in relation to the Appointments Clause,

holding that the former is a "secondary, or exceptional, method of appointing officers, while the Appointments Clause provides the primary, or general, method of appointment." *Id. at 58*. The Court then concluded that the Recess Appointments Clause's specification that recess-appointed officers terms "shall expire at the End of the [Senate's] next Session" implies that their appointments are intended to be made during a period between sessions (i.e., during an intersession recess of the Senate). *Id. at 75-79*.

The Third Circuit's reasoning makes it highly likely that the Supreme Court will address the intersessional versus intrasessional recess appointments issue at some point in the near future. Assuming that the NLRB's petition for certiorari is granted in the *Noel Canning* case (the Respondent there has consented that "certiorari is appropriate"), it is possible for the Supreme Court to decide the *Noel Canning* case on narrower grounds than the D.C. Circuit has. The Supreme Court could simply hold that the President's appointments of purported NLRB Members Block and Griffin were invalid because recess appointments cannot be made when Congress is meeting in pro-forma sessions, as it was when purported Members Block and Griffin were "recess-appointed" on January 4, 2012. A narrow ruling such as this would nullify all actions taken by purported Members Block and Griffin (and would clearly nullify their authority in this R case) but would not have to address intrasessional recess appointments per se nor the specific intrasessional recess appointment of purported Member Becker on March 27, 2010. The Third Circuit's decision concerning the intrasessional recess appointment of purported Member Becker, however, stands in direct conflict with the Eleventh Circuit's prior decision concerning the intrasessional recess-appointment of a federal judge. *Evans v. Stephens, 387 F.3d 1220 (11TH Cir. 2004).* Therefore, it seems highly likely that the Supreme Court must

also resolve the issue concerning the validity of purported Member Becker's intrasessional recess appointment at some point in the near future. If a petition for certiorari is timely filed by the NLRB in the *New Vista Nursing and Rehabilitation* case, perhaps that case and *Noel Canning* may be consolidated by the Supreme Court for resolution.

Thus, Employer's argument in this R Case, which the purported Regional Director has treated lightly thus far, is substantially consequential. Because purported Member Becker was invalidly appointed, purported Regional Director Orr was also invalidly appointed.

As noted in Employer's Memorandum of Law that was timely filed on February 26, 2013 and timely reiterated on March 27, 2013, for the election in the current matter to have been validly conducted, and for any further action by the office of the regional director and the Board in this matter to be valid, purported director Peter Orr must have been a valid appointee of a valid Board. It has been well understood for decades that a regional director has two functions—the representation case function (that Mr. Orr purportedly was exercising in this case) and the unfair labor practice case function. Due to Taft-Hartley's separation between the Board and the General Counsel, it is well understood that the General Counsel my not empower a regional director to perform representation case functions. Only the Board can do that, and an invalid Board like the one consisting of Members Pearce, Hayes, and purported Member Becker could not validly appoint or empower purported Regional Director Orr to perform representation case functions under Section 9 of the NLRA and the Board's own rules and practices.

Section 9 of the Act is clear that it falls within the authority of "the Board [not the General Counsel] . . . to direct an election by secret ballot and to certify the results thereof." Section 4 of the Act is plain that "the Board shall appoint the regional directors . . . . " Section 3(b) provides that "The Board is authorized to delegate to its Regional Directors its powers under Section 9 . . . to direct an election or take a secret ballot." Consistent with these provisions of the Act, section 102.69 of the Board's rules provides it is the Regional Director who must conduct the election, certify the results, initiate investigations of objections, and issue reports on objections. If the Regional Director has not been validly appointed by a valid Board, any and all such actions by the Regional Director in an R case like this one are invalid and lack authority. Nor may an invalid Board such as the current purported Board (consisting of intrasessional recess appointees Block and Griffin) certify the results of this invalid election pursuant to the Board's authority under Section 9 and the Board's rules or issue bargaining orders and have its orders enforced in the U.S. Courts of Appeals.

Conclusion

Mr. Orr was invalidly appointed as Regional Director by an invalid Board in December 2011. His actions thus far in the instant case have lacked authority, and the election administered with his direction and approval on February 19 is null and void, because it was administered without authority. Any further action in this R case by Mr. Orr or by a delegee group of the Board comprised of Chairman Pearce and purported Members Block and Griffin, will also be without authority. Given the substantially consequential legal issues raised by the D.C. Circuit's decision in *Noel Canning* and the Third Circuit's

decision in *New Vista Nursing and Rehabilitation,* this entire proceeding should be held in abeyance until an indisputably valid Board has been appointed and confirmed and there is a regional director who is validly appointed in Region 13 by a valid Board for the purpose of conducting the representation case functions of the Board. If and when a valid regional director is appointed by a valid Board, for the purpose of conducting representation case functions in Region 13, the previously-held, invalid election in this case must be rerun.

Respectfully submitted,

Mark B. Goodwin

Counsel for Employer C.R. England

May 29, 2013

CERTIFICATE OF SERVICE

I certify that on May 29, 2013, I electronically filed the foregoing

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with the National Labor Relations Board, Washington, D.C., via the Board's E-Filing System. A copy of these documents has also been served on the following parties in the manner indicated:

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